84-1992

Office Supreme Court, U.S.
FILED
MAY 22 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ALFRED GREEN, JR.,
Petitioner

vs.

STATE OF MISSISSIPPI,
Respondent

Russel D. Moore, III

Amy D. Whitten
(Counsel of record)

Matthew M. Moore

Post Office Box 864
Jackson, MS 39205
(601) 355-7777

8pp

QUESTIONS PRESENTED

1. The writ should be granted to determine whether or not a sufficient factual basis existed to establish probable cause for the issuance of an arrest warrant.

2. The writ should be granted to determine whether the evidence seized from Petitioner's home in an overbroad protective "sweep search incident to a constitutionally flawed arrest, was inadmissible as "fruits of a poisonous tree."

TABLE OF CONTENTS

	Page:
QUESTIONS PRESENTED----------	i.
TABLE OF CONTENTS----------	ii.
TABLE OF AUTHORITIES----------	iv.
I. INTRODUCTION----------	1.
II. OPINION BELOW----------	1.
III. JURISDICTION----------	2.
IV. CONSTITUTIONAL PROVISIONS INVOKED----------	2.
V. STATEMENT OF THE CASE----------	3.
A. The Substantive Facts------	3.
B. Procedural History---------	7.
VI. REASONS FOR GRANTING THE WRIT--	8.
A. The Writ Should Be Granted To Determine Whether Or Not A Sufficient Factual Basis Existed To Establish Probable Cause For The Issuance Of An Arrest Warrant.----------	8.
B. The Writ Should Be Granted To Determine Whether The Evidence Seized From Petitioner's Home In An Overbroad "Protective Sweep" Search Incident To A Constitutionally Flawed Arrest, Was Inadmissible as "Fruits of A Poisonous Tree."----------	19.

TABLE OF CONTENTS--Continued

Page:

VII. CONCLUSION---------- 35.

CERTIFICATE OF SERVICE---------- 36.

TABLE OF AUTHORITIES

Cases:	Page:
Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723(1964)----------	9
Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)----------	29
Green v. State, 465 So.2d 999(Miss. 1985)(not designated for publication)----------	1
Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527(1983)--	9 10
Nathanson v. United States, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933)----------	10
Segura v. United States, ___ U.S. ___, 104 S.Ct. 3380, 82 L.Ed.2d 599(1984)----------23-7	
Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 589, 21 L.Ed2d 637(1969)----------	9
United States v. Bronowski, 575 F. Supp. 668(W.D.Pa.1983)-----	12
United States v. Kolodziej, 706 F.2d 590(5th Cir. 1983)-------	30 32
United States v. Sheikh, 654 F.2d 1057(5th Cir. 1981)------	31
United States v. Mangeri, 451 F. Supp. 73(S.D.N.Y.1978)-----	33

TABLE OF AUTHORITIES--Continued

Wong Sun v. United States,
371 U.S. 471, 83 S.Ct. 407,
9 L.Ed.2d 441(1963)---------- 20

Other: Page:

LaFave, Wayne, Search and Seizure:
A Treatise on the Fourth
Amendment, 1978---------- 29

28 U.S.C. Sec. 1257(3)---------- 2

United States Constitution,
Fourth Amendment---------- 2

United States Constitution,
Fourteenth Amendment----------2-3

QUESTIONS PRESENTED

1. The writ should be granted to determine whether or not a sufficient factual basis existed to establish probable cause for the issuance of an arrest warrant.

2. The writ should be granted to determine whether the evidence seized from Petitioner's home in an overbroad protective "sweep search incident to a constitutionally flawed arrest, was inadmissible as "fruits of a poisonous tree."

I. INTRODUCTION

This matter is before the Court on Petition for Writ of Certiorari from the Mississippi Supreme Court wherein that Court affirmed Petitioner's conviction of possession of marijuana and accompanying twenty year prison sentence.

II. OPINION BELOW

State Court: The opinion of the Supreme Court of Mississippi affirming Petitioner's conviction of possession of more than one kilogram of marijauna and sentence of twenty years is reported as Green v. State, 465 So.2d999 (1985)(not designated for publication). The Court denied petition for rehearing, without opinion, on April 10, 1985.

III. JURISDICTION

The judgment of the Mississippi Supreme Court was issued on February 20, 1985. A timely petition for rehearing was denied on April 10, 1985. The Court's mandate issued on April 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

IV. CONSTITUTIONAL PROVISIONS INVOKED

This case involves the Fourth Amendment to the Constitution of the United States, viz.,

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,...but upon probable cause....;"

and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, viz.,

> "...nor shall any state deprive

any person of life, liberty or property without due process of law...."

V. STATEMENT OF THE CASE

A. The Substantive Facts

The substantive facts, as established by the record herein, reflect that agents of the Mississippi Bureau of Narcotics in Jackson, Mississippi, received information from a confidential informant on July 15, 1981, that a person named Bernard Ross had a small quantity of cocaine he wished to sell for $1200.00. Agent Mike Turner arranged for the informant to meet Ross in a restaurant parking lot in Madison County, Mississippi. Turner outfitted the informant with a listening device and the informant met with Ross. Agent Turner observed this meeting from a distance. Turner heard Ross tell the informant that he did not have the cocaine with him, but would obtain it from an individual in

nearby Jackson, Mississippi, and he would return and deliver the cocaine to the informant.

Accompanied by two other agents, Turner followed Ross to the Residences Apartments in Jackson, and saw a man, later identified as Percy Clay, standing in the doorway of Building "A" of the apartments. Ross entered the building and stayed for about thirty minutes. During that time, Agent Turner drove through the apartment parking lot and observed a red Thunderbird. He also observed Bernard Ross and Percy Clay leave together, and the agents followed the two men back to the restuarant where the quantity of cocaine was delivered by Bernard Ross to the informant. The informant delivered the substance to a narcotics agent, and Ross and Clay were arrested.

At the time of his arrest, Bernard Ross stated that he had gotten the cocaine

from Percy Clay. Ross stated that Clay had said that he was going to get the cocaine from Alfred Green, a twenty year old black honor student at Jackson State University, and Petitioner herein. Ross told Turner that Clay had said that Petitioner wanted $1100.00 for the cocaine. Ross also indicated that Clay said he had gotten the cocaine from Petitoner. Agent Turner then wired Ross and sent him to Clay's apartment to see if he could get any more information which would link Green to cocaine trafficking. The conversation which ensued between Ross and Clay's girlfriend, C.C., involved some discussion about some money that Clay owed a man named Al, but at no time were drugs mentioned.

Based upon the foregoing, Agent Turner appeared before Madison County Magistrate Shanks and procured a warrant for the arrest of Petitioner for

conspiracy to possess and deliver cocaine. Based on oral testimony to Judge Shanks as to the hearsay information provided by Ross, an arrest warrant issued on July 31, 1981. Pursuant to that warrant, Agent Turner, accompanied by Agents Berry and Norton, went to Petitioner's apartment around 2:30 p.m. on July 31, 1981. The agents heard music playing as they approached the door. The agents knocked on the door, and after a short time were allowed into the apartment by Petitioner. No one was in the apartment except Green. Nothing appeared to be out of the ordinary, according to the testimony of Agent Turner. Upon arrest of Petitioner, Agents Berry and Norton made a sweep search of the entire apartment, by their account, looking for other persons who might be in the apartment. According to Agent Berry, he moved to the back of the apartment and

looked into the master bedroom. After finding nothing, he opened a closed bedroom door and looked into a second bedroom. There, he viewed some marijuana and scales. Thereafter, he went to back into the livingroom where Petitioner was secured. and informed him that he was also under arrest for possession of marijuana. Petitioner refused to consent to a search of the premises and Agent Turner took him to jail. Agent Turner also obtained a search warrant based upon the marijauna discovered by Agent Berry. The subsequent search produced several pieces of inculpatory evidence.

B. Procedural History

On February 2, 1983, Petitioner was found guilty of possession of marijuana in an amount more that one kilogram by a jury in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and

was sentenced to serve twenty years in the Mississippi State Penitentiary. Thereafter, timely appeal was perfected to the Mississippi Supreme Court. Appeal was denied and the conviction was affirmed on February 20, 1985. Petition for rehearing was subsequently denied on April 10, 1985.

VI. REASONS FOR GRANTING THE WRIT

A. The writ should be granted to determine whether or not a sufficient basis existed to establish probable cause for the issuance of an arrest warrant.

Petitioner asserts that no sufficient basis existed for the issuance of an arrest warrant, and that the Mississippi Supreme Court erred in finding that the issuing magistrate had "sufficient reasonably trustworthy information to justify the belief that Green had participated in a cocaine sale." The issuance of the arrest warrant absent probable cause constitutes a violation of

Petitioner's right to be free from unreasonable searches and seizures.

This Court, in its decision of Illinois v. Gates, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), specifically abandoned the "two-pronged test" which had been developed pursuant to the earlier decisions of Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509(1964) and Spinelli v. United States, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 589(1969). In place of the "two-pronged test" the Court reaffirmed the totallity of the circumstances analysis that traditionally informed probable cause determinations. In the majority's opinion, Justice Rehnquist stated:

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband

or evidence of a crime will be found at a particular place."

76 L.Ed.2d 548.

The affidavit presented to issuing magistrate in the present cas of the type condemned in Nathanso United States, 290 U.S. 41, 78 L. 159, 54 S.Ct. 11(1933), in that it presented a conclusory statement Petitioner had conspired to transfe deliver a quantity of cocaine. The nothing in the affidavit itself would provide a substantial basis fo determination of the existence of pro cause. In an attempt to overcome infirmity of the arrest warrant, Turner presented oral testimony to issuing magistrate seeking to esta probable cause to believe that conclusory statement within the affi was in fact true.

Petitioner asserts that the test related to the issuing magistrate f

to set forth any substantial basis for determining the existence of probable cause. All testimony regarding the alleged actions of Alfred Green, Petitioner herein, were related to Agent Turner by Bernard Ross, who had been arrested for delivery of cocaine. Agent Turner testified that to his knowledge, Bernard Ross did not have any firsthand knowledge of Alfred Green's involvement in the cocaine transaction. It was admitted by Agent Turner that everything that Bernard Ross told him about Alfred Green was not based upon personal knowledge, but was in fact based upon what was told to Bernard Ross by Percy Clay, who was arrested alongside Bernard Ross for delivery of cocaine.

Although the "veracity" and the "basis of knowledge" spurs are no longer requisite to a finding of probable cause, "under the 'totality of the circumstances'

formulation of the probable cause standard, the informant's veracity, reliability and basis of knowledge all remain highly relevant determinations." Unites States v. Bronowski, 575 F. Supp. 668 at 672(W.D. Pa., 1983). In the instant case, not one shred of evidence was presented to the issuing magistrate to show that Bernard Ross was a truthful or reliable citizen. Further, it was positively shown that Ross' knowledge rested entirely upon statements made to Ross by Percy Clay, and that none of his statements were made with regard to firsthand knowledge.

If the police officer is able to substantially corroborate the information which he received from the informant then the information may be sufficient to establish probable cause. A careful study of the record will reveal that Agent Turner failed to corroborate any

incriminating information which he received from Bernard Ross. In an attempt to supply some evidence of corroboration, Agent Turner testified that he saw a red Thunderbird, which was registered to Alfred Green, parked in the parking lot of the Residences Apartments on July 15, 1981. The fact that Alfred Green lived in the Residences Apartments and parked his car in the parking facility provided to tenants can hardly be considered corroborative of an allegation that he was involved in drug trafficking. Agent Turner also testified about a conversation which he overheard by way of a listening device between Bernard Ross and Percy Clay's girlfriend. During the course of the conversation, a statement was made to the effect that Clay owed an individual named Al a sum of money. During this conversation, no mention of drugs was made, and there was no certainty that the

individual referred to as Al was actually Alfred Green. From the facts as testified to by Agent Turner, Petitioner asserts that there is simply no substantial basis for concluding that probable cause existed to issue the arrest warrant.

Petitioner also contends that the Mississippi Supreme Court failed in its duty to insure that the magistrate had a substantial basis for concluding that probable cause existed. More particularly, the opinion handed down by the Mississippi Supreme Court clearly indicates that the Court misread or misinterpreted the facts which were presented to the Madison County magistrate. In his opinion, Justice Sullivan condensed the facts presented to Judge Shanks as follows:

> "...A co-conspirator in a cocaine sale stated that his accomplice obtained the cocaine from Green. Turner's personal observations partially corroborated Green's presence in

> the building at the time of the cocaine sale. Further, the conspirator elicited statements from a friend of the defendant, who acknowledged that the defendant had sold the cocaine. Finally, the person from whom the cocaine was purchased went to Green's apartment empty-handed and returned with cocaine. Based upon these facts, we find that the trial judge was presented with sufficient evidence from which to conclude that there was probable cause for an arrest warrant for Green."

Petitioner respectfully submits that the facts which the Mississippi Supreme Court employs to uphold the finding of probable cause simply do not exist within the confines of the record of this case. The findings which the Court made in its opinion require conclusions to be drawn from the testimony of Agent Turner which are not evident therein.

In its decision, the Mississippi Supreme Court found that "A co-conspirator in a cocaine sale stated that his accomplice obtained the cocaine from

Green." This finding implies that Agent Turner's informant, Bernard Ross, had actual firsthand knowledge of the transaction between Percy Clay and Alfred Green, Petitioner herein. The record itself indicates that this was in fact "double hearsay", i.e. information which had been told to Bernard Ross who in turn told it to Agent Turner.

A further finding of fact by the Mississippi Supreme Court was that, "Turner's personal observations partially corroborated Green's presence in the building at the time of the cocaine sale." The Court only acknowledged Turner's observation as partial corroboration. Petitioner asserts, however, that it is not corroborative of the Petitioner's involvement in any illegal activity at all, much less the cocaine sale which was alleged in the affidavit.

The Mississippi Supreme Court's next finding of fact was that, "Further, the conspirator elicited statements from a friend of the defendant, who acknowledged that the defendant had sold the cocaine." There is no basis in the record whatsoever for the Court to have found this as a fact. Petitioner would venture to guess that the Court refers to the vague statements allegedly made by Percy Clay's girlfriend during her conversation with Bernard Ross on July 16, 1981. The statements made during that conversation were never linked with the Petitioner, Alfred Green,and no mention was made during that conversation that any money was owed to anyone as a result of a drug transaction.

The Mississippi Supreme Court further found, "Finally, the person from whom the cocaine was purchased went to Green's apartment empty-handed and returned with

the cocaine." After carefully reveiwin the record Petitioner was unable to fin any showing that Percy Clay went to Alfre Green's apartment on July 15, 1981. Th only proof was that Clay told Ross that h was going to Green's apartment, that Cla left his own apartment for a few minutes and that Clay returned to his apartmen with cocaine. However, there is nothin to show that Clay actually went to Green' apartment. It is just as probable tha Clay merely walked outside for a breath o fresh air, or that he went to som apartment other than Green's, or perhap he sat outside his own apartment door fo reasons only he would know. Nor does th record indicate whether Clay was actuall "empty-handed" when he left his apartment

In sum, the record herein reflects n articulable facts from which a neutral an detached magistrate could determine tha there was probable cause to arres

Petitioner. Consequently the warrant precipitating his arrest was constitutionally flawed. The Mississippi Supreme Court erroneously applied this Court's teachings to the facts in this case, a mistake Petitioner urges this Court to address and remedy.

B. The writ should be granted to determine whether the evidence seized from Petitioner's home in an overbroad "protective sweep" search incident to a constitutionally flawed arrest, was inadmissible as "fruits of a poisonious tree."

Having heretofore shown that Petitioner's arrest was made absent probable cause for issuance of an arrest warrant, Petitioner asserts that the Mississippi Supreme Court also erred in upholding admission of the tangible evidence seized in a post-arrest warrantless search conducted under the guise of a "protective sweep."

It is at this point in our legal

evolution crystally clear that

> "where the search of the person or the surrounding area has its only justification as being 'incident to' the arrest..., then unquestionably the evidence found in the search must be suppressed if the antecedent arrest was in violation of the Fourth Amendment."
>
> LaFave, Search and Seizure, Sec. 11.4(d) at 642.

As stated more specifically,

> "In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, (citations omitted) this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. (citations omitted). The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.
>
> * * *
>
> ...the more apt question is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. (citation omitted).
>
> Wong Sun v. United States, 371

U.S. 471, 484-5, 487, 83 S.Ct. 407, 9 LEd.2d 441, 455 (1963).

In the present case, the record clearly establishes that three Mississippi Bureau of Narcotics agents arrested Petitioner at his home at around 2:30 p.m. on July 31, 1981. At the time of his arrest, he was alone in his apartment. According to Agent Mike Turner, no one was in the apartment other than Petitioner. Additionally, Agent Turner noticed nothing "out of the ordinary," with the exception of loud radio music. Following the totally uneventful arrest of Green, Agents Berry and Norton conducted a sweep search of the entire apartment. According to Agent Turner, such a search is conducted by the Bureau "if I have reason to believe that someone might try to hinder the arrest." Through the testimony of Agent Berry, he and Agent Norton walked down the hall to the bedrooms. They looked in the master bedroom , then opened another door

on the hall and looked in a smaller second bedroom. In this closed room, they discovered some marijuana and some scales. At that point the two agents returned to the dining room area wherein Petitioner was already secured by Agent Turner and informed Green that he was also being charged with possession of marijuana. Green refused to consent to a search of his apartment. Thus, Agent Berry and Norton remained at the apartment while Agent Turner took Green to jail and obtained a search warrant for the premises.

In reliance on point (1) of this petition, Petitioner suggests that any evidence seized at this apartment, whether in the sweep search incident to arrest or pursuant to the later warrant, was obtained solely as a product of the illegality of the earlier arrest warrant. The warrant was the only

authorization for the presence of the three agents at Petitioner's residence. Accordingly, it cannot be said that there was any conceivable independent source for the discovery of the marijuana. The revelation of the contraband was inextricably tied to the tainted arrest warrant, and as such, should be condemned under the tenets of Wong Sun, supra, and its progeny.

Most recently, this Court addressed the issue of tainted derivative evidence in Segura v. United States, ___ U.S. ___, 104 S.Ct. 3380, 82 L.Ed.2d 599(1984). Therein, petitioners Segura and Colon were arrested for trafficking in cocaine. The facts surrounding the arrest and subsequent search of Segura's apartment are described in the Court's opinion as follows:

> "At about 7:30 p.m., the agents arrived at petitioners' apartment and established external surveillance. At 11:15

p.m., Segura, alone, entered the lobby of the apartment building where he was immediately arrested by agents. He first claimed he did not reside in the building. The agents took him to his third floor apartment, and when they knocked on the apartment door, a woman later identified at Luz Colon appeared; the agents then entered with Segura, without requesting or receiving permission. There were three persons in the living room of the apartment in addition to Colon. Those present were informed by the agents that Segura was under arrest and that a search warrant for the apartment was being obtained.

Following this brief exchange in the living room, the agents conducted a limited security check of the apartment to insure that no one else was there who might pose a threat to their safety or destroy evidence. In the process, the agents observed in a bedroom in plain view, a triple-beam scale, jars of lactose, and numerous small celophane bags, all accouterments of drug trafficking. None of these items was disturbed by the agents. After this limited security check, Luz Colon was arrested. In the search incident to her arrest, agents found in her purse a loaded revolver and more than $2,000 in cash. Colon, Segura, and the

other occupants of the apartment were taken to Drug Enforcement Administration headquarters."

82 L.Ed.2d at 605-6.

Segura challenged the admission of the evidence seized during and following his arrest as fruit of a tainted entry. In holding the evidence admissible despite the illicit initial entry into Segura's apartment, this Court held the following:

> "Under this Court's holdings, the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, Weeks v. United States, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 331(1914), but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338,341, 84 L.Ed. 307, 60 S.Ct. 266(1939). It "extends as well to the indirect as the direct products" of unconstitutional conduct. Wong Sun v. United States, 371 U.S. 471, 484, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).
>
> Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be

> resolved when it is claimed that evidence subsequently obtained is "tainted" or is "fruit" of a prior illegality is whether the challenged evidence was
>
> come at by exploitation of (the initial) illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Id., at 488, 9 L.Ed.2d 441, 83 S.Ct. 407(citation omitted; emphasis added.)
>
> 82 L.Ed.2d at 608.

The Court went on to hold that th search of Segura's apartment to preven destruction of evidence while a searc warrant was being obtained did no constitute an "unreasonable seizure o either the dwelling or its contents." 8 L.Ed.2d at 612. The Segura Cour distinguished its holding based on th "independent source" doctrine, stressin the wholly independent basis for issuanc of the resulting warrant, as follows:

> "Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that

evidence was seized. Exclusion of evidence as derivative or "fruit of the poisonous tree" is not warranted here because of that independent source.

None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged. This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of that search, wholly unrelated to the prior entry. The valid warrant search was a "means sufficiently distinguishable" to purge the evidence of any "taint" arising from the entry. Wong Sun, 371 U.S., at 488, 9 L.Ed.2d 441, 83 S.Ct. 407."

82 L.Ed.2d at 614-15.

The present case stands in stark

contrast to the situation in Segura Herein, the warrant ultimately obtained b the agents was predicated totally o information observed while the agents wer in Petitioner's apartment pursuant to a infirm arrest warrant. The warrant wa for conspiracy to possess and delive cocaine, not for any violation relative t marijuana. It cannot be fairly said tha there was any source for Agent Berry' search or the later search warrant sav the previous entry to arrest Petitioner Thus, Petitioner alleges that th exclusionary principles of Wong Sun supra, apply to this case, and th evidence stemming from his illegal arres should have been suppressed.

Assuming arguendo, that the agent were in any manner on the premise legally, Agent Berry's action i undertaking a "protective sweep" searc was totally unwarranted. The concept o

the "protective sweep" must be viewed within the ambit of a search incident to arrest. Pursuant to a lawful arrest, an officer may search the subject arrested and the area within his immediate control from which a weapon could be obtained or evidence destroyed. This doctrine, however, does not justify a routine search of any room other than that in which the arrest occurs. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685(1969).

Existing within the field of searches incident to arrest is the court-created exception of police protective sweep, commonly described as a "cursory inspection fo the balance of the premises to ensure their own safety while departing with an arrestee. LaFave, Search and Seizure, Sec. 6.4 at 427.

The Court of Appeals of the Fifth Circuit has discussed the parameters of

the doctrine in the following fashion:

> "One of the well-recognized exceptions' to the requirement of a search warrant, followed in this and a majority of the circuits, is the so-called cursory safety check excpetion'. The realities and practicalities of law enforcement dictate that in certain emergency situations strict adherence to constitutional safeguards against intrusion into the home may be excused. We recently stated the exception as follows:
>
> > Arresting officers have a right to conduct a quick and cursory check of the arrestee's lodging immediately subsequent to arrest--even if the arrest is near the door but outside the lodging--where they have reasonable grounds to believe that there are other persons present inside who might present a security risk.
>
> United States v. Kolodziej, 706 F.2d 590 (5th Cir.1983).

To invoke the protective sweep searc exception, however, " the governmen must show that there was a serious an demonstrable potentiality fo danger.'"(citations omitted). In othe

words, police must "...have reasonable grounds to believe that there are other persons who might present a security risk." United States v. Sheikh, 654 F.2d 1057 (5th Cir.1981).

United States v. Kolodziej, supra, presents a classic case of misuse of the sweep exception. In that case, the defendant was arrested on a drug charge inside his home in San Marcos, Texas. He was unarmed and gave no resistance. Following his arrest, officers conducted a sweep search of the entire house and found an open film cannister on the kitchen counter about 15 or 20 feet from where Kolodziej was arrested. Agents later defended the search on the claim that they had been earlier told by an informant that kolodziej was sometimed known to work with a partner and always carried a gun. Based on the marijuana found, a search warrant was obtained and larger amounts of

marijuana were discovered.

The Fifth Circuit condemned the swee search as unnecessary under the fact surrounding the arrest. Initially notin that such a search is permissible onl where the circumstances establish probabl cause to believe a serious threat t safety is posed, in Kolodziej, the Cour applied the law to the facts thusly:

> "The only evidence offered by the government to justify the security sweep was the testimony of one of the arresting officers that he thought there was a possibility that a man named Barney',who worked with the defendant, might be in the residence at the time of the arrest, and that Kolodziej occasionally carried a .357 magnum pistol. No evidence was presented to show how the officers had reason to believe that Barney was there, in fact had ever been there, or was dangerous. Drug dealers frequently have accomplices, but that fact alone does not justify a warrantless search. That the defendant carried a firearm is also insufficient. At the time the officers made the safety check, Kolodziej was already in custody, unarmed, handcuffed, and clearly no threat to the

half-dozen agents present at the arrest.

706 F.2d at 597.

Kolodziej makes it clear that the protective sweep is not allowed law enforcement officers as a matter of routine. There must be articulable facts upon which a conclusion may be drawn that there were or might be, other persons in the house. While a raft of case law exists in explanation of what "articulable facts" are sufficient, the cases unanimously suggest some proof of danger must appear. United States v. Mangeri, 451 F. Supp. 73 (S.D.N.Y. 1978) gives as examples the following factors which have been found sufficient as including evidence of armed accomplices, evidence that agents were refused entry and had to break the door down, evidence that agents heard scurrying sounds or flushing of toilets inside the residence, etc.

Suffice it to say that the factor articulated by Agents Turner and Berry i.e. that the radio was turned up loud an that Petitioner hesitated in answering th door, can hardly pass muster as adequat evidence of exigency or belief that othe persons were inside the apartment Petitioner's alleged accomplices ha already been arrested by these sam agents. No one indicated that any othe persons might be inside Petitioner' home. In sum, the agents herei articulated no reason to excuse thei failure to secure a warrant prior t entering a closed room in Petitioner' apartment. Consequently, the evidenc observed therein and the evidenc resulting from a warrant obtained shortl thereafter, was used in violation o Petitioner's Fourth Amendment rights, i order to secure a conviction against him.

VII. CONCLUSION

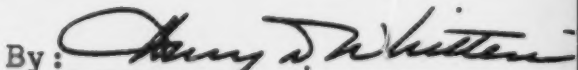
For the Foregoing reasons petitioner respectfully request the Court to grant the petition for writ of certiorari to the Mississippi Supreme Court to review the decision herein.

Respectfully submitted,

RUSSEL D. MOORE, III

AMY D. WHITTEN
(Counsel of Record)

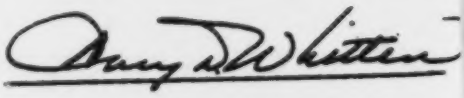
MATTHEW M. MOORE

By: 
AMY D. WHITTEN

CERTIFICATE OF SERVICE

I, Amy D. Whitten, do hereby certify that I have this day caused to be mailed via United States mail, first-class postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari to Honorable Edwin Lloyd Pittman, Attorney General for the State of Mississippi, Post Office Box 220, Jackson Mississippi 39205.

This the _____ day of May, 1985.



AMY D. WHITTEN

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,491

ALFRED GREEN, JR.

VS.

STATE OF MISSISSIPPI

NOT DESIGNATED FOR PUBLICATION

COURT FROM WHICH APPEALED:
Circuit Court, Hinds County

TRIAL JUDGE:
Hon. L. Breland Hilburn

ATTORNEYS FOR APPELLANT:
Hermel Johnson
P. O. Box 2887
Jackson, MS 39207

ATTORNEY FOR APPELLEE:
Hon. Edwin Lloyd Pittman
By Marvin L. White, Jr.
Special Ass. Atty. Gen.
Post Office Box 220
Jackson, MS 39201

CHARGE AND SENTENCE:
Possession of over 1 kilogram
of marijuana- 20 years MDC

Disposition:
Affirmed.

BEFORE PATTERSON, SULLIVAN
AND ANDERSON

SULLIVAN, JUSTICE, FOR THE COURT:

In the Circuit Court of Hinds County,

Mississippi, Alfred Green, Jr. wa convicted of possession of more than kilogram of marijuana and was sentenced t twenty years imprisonment with th Mississippi Department of Corrections. H assigns as error the trial court's actio in:

1. Overruling his motion to supres an oral statement in violation of Miranda

2. Allowing a state's witness t comment on appellant's failure to respon to questions during custodia interrogation.

3. Submitting an additiona instruction or note to the jury after jur deliberations commenced and in the absenc of counsel and appellant.

4. Overruling motion to supres evidence.

On July 15, 1981, State Narcotic Agent Mike Turner was told by

confidential informant that one Bernard Ross had 1/2 ounce of cocaine for sale for $1200.00. The informant was wired for sound and sent to meet with Ross. Ross told the informant that he, Ross, did not have the cocaine with him but would go and get it.

Agent Turner followed Bernard Ross to the Residence Apartments where he saw one Percy Clay standing in a doorway. Passing by again, Turner saw that a red Thunderbird automobile had arrived. The tag registration revealed that the car belonged to Alfred Green, Jr.

Ross and Clay delivered the cocaine to the informant and were arrested. Ross volunteered that Clay had obtained the cocaine from Green, and gave an accurate description of Green, and his car, and he gave Green's correct address. On the next day, July 16, 1981, Agent Turner sent Ross back to Clay's apartment wearing a

listening device to try to obtain mor evidence against Green. Ross met C.C. Clay's female roomate, who discussed wit Ross the money owed to Clay that was i turn owed by Clay to Green. She offere to talk to Green for Ross.

On July 31, 1981, agent Turner orall recited this information under oath befo Justice Shanks and obtained an arres warrant charging Green with conspiracy t tranfer and deliver cocaine. About 2:3 p.m. that same day, agent Turner wit Officers Berry and Norton, served th arrest warrant upon Green at hi apartment. Berry and Norton conducted "protective sweep" search of the apartmen for other persons, and in so doing in spare room Berry saw several bags o marijuana and some scales on and around footlocker in the middle of the roo Berry charged Green with possession o marijuana and asked him to consent to

search of the apartment, but Green refused. Agent Turner took Green to jail, leaving Berry and Norton to secure the apartment, and Turner returned about 4:15 p.m. with a search warrant. A search of the spare room revealed five bags, a black pouchm and two cigarettes of marijuana in plain view around the footlocker. Inside the footlocker was another bag of marijuana wrapped in newspaper. In the closet of the same room the agents found a cloth sack inside a large cardboard box that contained five more bags of marijuana. The total quantity was about 10 pounds, or 3.08 kilograms.

On November 4, 1981, the Hinds County grand jury indicted Green for possession of more than one kilogram of marijuana. Several days later, Green's lawyer contacted Agent Turner abd told him that Green wanted to talk to him. Turner met with Green alone at the Madison County

jail.

Turner's version of this conversatio was that he came to see Green at Green' lawyer's request because Green ha information for him. Turner did not giv Green his Miranda warnings at this time Turner claims that Green told him tha Green had a source in Florida that in th past had supplied him with pounds o marijuana which Green would bring back t Jackson in suitcases, via commercia airlines. Turner also said that Gree told him that the source could also suppl cocaine.

Green stated to the contrary tha Turner came to ask him if he would giv information about his sources. Green sai he could not give information because th drugs did not belong to him and he kne nothing about where they came from. I response to Turner's statement that Gree was going back and forth to Florida base

on finding luggage stubs and flight schedules in the spare room, Green said that the schedule and luggage belonged to Green's brother, who had spent the night there the day before Green was arrested.

Green's objection to the admission of any of the statements that he made to Turner at the interview on the ground that he had not been advised of his Miranda rights was overruled. The court did, however, exclude any reference to the cocaine.

At the pretrial hearing on the question of whether Green's arrest warrant was based upon probable cause, the state's sole witness, Agent Turner, identified the general affidavit charging Green with conspiracy to possess cocaine in connection with the earlier transaction. This affidavit contains no underlying facts to support a determination of probable cause. Turner told the Justice

Court Judge of his investigation of Ros and Clay in which Green was implicated i the sale of the 1/2 ounce of cocaine Turner stated that Ross, Clay, and C.C indicated that the cocaine had come fro Green. Turner denied that everything h knew was based simply on hearsay; it wa information from a co-conspirator, Ross that was verified in part by Turner's ow personal observations. At the conclusio of the suppression hearing the trial cour overruled Green's motion to suppress an ruled that the arrest warrant was issue based on probable cause.

Agents Turner and Berry testified fo the state at trial. During Berry' testimony, the following occurred:

> Q. Was he ever taken back there by the bedroom area?
>
> A. Yes, sir. After he had been advised of his rights I took him back there and showed him what we had found and asked him where did it come from, what it was doing there, something like that, and he made no

response to it.

Q. What next did you do?

BY MR. JOHNSON: I'm going to object to the last remark that defendant made no response. He has a right not to make a response.

BY THE COURT: Yes. Well, I think the Jury understands that.

Green testified that the night before his arrest, his brother Larry and Larry's fiance were staying at his apartment, having just returned from a vacation in Florida. Green claimed he had not looked in the spare room from the time he returned from Natchez the night before his arrest to the time of his arrest. He said that the luggage and footlocker did not belong to him, but to his brother. He refused to accuse his brother of owning the drugs and his brother was not subpoenaed to testify. Green did not know when, how or by whom the drugs were brought to his room.

After all the evidence was in, th jury retired to deliberate. A note wa sent out which reads:

> Need a definition or legal description of what constitutes possession.

The trial court sent in a note whic reads:

> You have been given sufficient instructions in this case. No further instruction may be sent to you.

These notes were reconstructed from th torn up scrapes in the envelope. Counse for Green objected in writing to the us of the word "sufficient" on the groun that the jury would interpret it a requiring them to reach a verdict.

The jury returned a verdict of guilt and Green was sentenced to 20 year imprisonment.

I.

WAS GREEN'S INCULPATORY STATEMENT IMPROPERLY ADMITTED INTO EVIDENCE BECAUSE THE MIRANDA WARNINGS WERE NOT GIVEN.

Green's contention is that his inculpatory statement to Agent Turner that he had a marijuana source in Florida should have been suppressed because it was the result of a custodial interrogation made without advising him of his Miranda rights. Green denied that he informed his attorney that he had information for agent Turner.

Green relies upon Burch v, State, 302 So.2d 249(Miss. 1974), in which this Court stated:

> An officer must advise a prisoner of his constitutional rights before interrogating him about the facts of the alleged crime for which he has been arrested. The failure to do so prevents the officer from testifying about any incriminating statement the prisoner may have made as to his guilt. If the trial court permits the officer to testify,

> at the instance of the prosecution, about any self-incriminatory statement made by the defendant without his having warned, the judgment of the trial court must be reversed for a trial de novo without the officer's testimony. This is true even though there is ample evidence aside from the confession to support his conviction.

Id. at 250. Green also cited Taylor v State, 406 So.2d 811(Miss. 1981), in whic this Court ruled that a video-tape meeting in which the district attorne questioned the defendant about assau charges pending against him wa inadmissible because the defendant had n been apprised of his Miranda warnin prior to the meeting. Id. at 812.

In Miranda v. Arizona, 384 U.S. 43 86 S.Ct. 1602, 16 L.Ed.2d 694(1964), t Supreme Court made clear that t procedural safeguards applied where t defendant was subject to custodi interrogation, which was defined

"questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action is any significant way." Id. at 444, 16 L.Ed.2d at 706. Further, the Miranda court stated:

> Any statement given freely and voluntarily without impelling influences is, of course, admissible in evidence.... There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession, or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Id. at 478, 16 L.Ed.2d at 726.

This Court has allowed into evidence statements made despite the absence of Miranda warnings under the rubric of "on the scene investigation". In Fornett v. State, 392 So.2d 1154(Miss. 1981), the defendant, on seeing the police officers,

blurted out "I'm the man you want. I'
the one that shot him." The police aske
one question, "Was that the gun used?", t
which the defendant answered "Yeah". Thi
Court stated that such a spontaneou
statement as this was admissible. Thi
Court quoted Nevels v. State, 216 so.2
529(Miss. 1968), which states:

> In the instant case, the statements were given freely and voluntarily without any compelling influence. These initial admissions by defendant, as he walked toward the patrolman, in which he confessed to the crime of stealing the wire, were "volunteered statements" not barred by the Fifth Amendment....State v. Gossar, 50 N. J. 438, 236 A.2d 377(1967), somewhat analogous to the present case, states: "The decision (Miranda) recognized, however, at least two exceptions. One is general on-the-scene questioning as to facts surrounding a crime, and the other statements freely volunteered without influences. 384 U.S. at pp.477-78, 86 S.Ct. at 1629, 16 L.Ed2d at 725-26.

216 So.2d at 531.

We find, based on defense counsel's admission that he arranged the meeting between Green and Turner, that Green's statement was volunteered, and not the product of custodial interrogation; therefore, the Miranda warnings were not required. Fornett v. State, supra; Nevels v. State, supra.

This assignment of error is without merit.

II.

DID THE TRIAL COURT ERR IN ALLOWING LT. BERRY TO COMMENT ON GREEN'S FAILURE TO RESPOND TO QUESTIONS DURING INTERROGATION?

Green relies upon Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91(1976), wherein the United States Supreme Court held that the use of the defendant's silence at the time of his arrest and after receipt of Miranda

warnings violated the due process claus of the Fourteenth Amendment. This Cour applied Doyle in Austin v. State, 38 So.2d 600(1980), wherein the prosecutor i closing argument stated:

> And if he was not guilty, why didn't he tell the law enforcement officers that? I asked him, did he give a statement? No.

This Court held that, in view of defens counsel's general objection to th comment, the error was not properl preserved for appeal. Id. at 601 Further, this Court reviewed the entir record and concluded in view of th overwhelming evidence of the defendant' guilt, the error was deemed harmless. Id

In this case, the remark was not mad by a prosecutor but by one on th arresting officers. The officer's commen was unsolicited and couched in narrativ terms. Defense counsel made a specifi objection that Green had a right not t

respond, to which the court replied "Yes, well, I think the jury understands that."

Unlike Austin v. State, this point has been preserved for appeal and must be passed on. It should be noted that the trial court's response to the objection appears to sustain the objection and direct the jury to disregard the comment. However, under Austin v. State, when we look at the totality of the evidence in this case to determine whether this comment was harmless error in view of overwhelming evidence of guilt, we cannot but conclude that, while it was error, it was harmless error.

There is no merit to this assignment of error.

III.

DID THE TRIAL COURT ERR IN SUBMITTING A NOTE TO THE JURY IN RESPONSE THE JURY'S QUESTION?

During the jury's deliberation it sent out a note requesting a definition or

legal description of what is possession

The trial court's response was:

> You have been given sufficient instruction in this case. No further instruction may be sent to you.

Defense counsel objected to the use of th word "sufficient" on the ground that i could be interpreted by the jury a requiring them to reach a verdict.

In Warren v. State, 336 So.2 726(Miss. 1976), when the jury appeare deadlocked, the circuit judge gave a instruction on the punishment of murde and manslaughter convictions, to which th defendant objected. This Court reverse because the subsequent instructions of th circuit judge implied that he would give lighter sentence if the jury returned verdict of guilty of manslaughter. I Carrol v. State, 391 So.2d 1000(Miss 1980), the jury sent a note asking th circuit judge to interpre

"premeditation". In response, the circuit judge explained the meaning of the term "malice aforethought". This Court reversed on the ground that the trial court's action in defining "malice aforethought" influenced the jury to convict the defendant of murder rather than of manslaughter. In Carrol, the parties were not given an opportunity to object to the instruction proposed to be given until after the jury retired. In Martin v. State, 415 So.2d 706(Miss. 1982), this Court held that it was reversible error for a circuit judge to tell a jury that they could recommend mercy in their verdict but it would not be binding upon the court. Finally, in Girton v. State, 446 So.2d 570(Miss 1984), one juror requested instruction on the question of self-defense. The circuit judge replied:

> The state does not have to prove the acts of the defendant were

> reasonable. It is a question of fact for the jury to determine. The reasonableness or his acts or factual questions. Follow the written instructions as you determine them to be.

This Court, in reveiwing the above cases, concluded that "We can find absolutely nothing about either the inquiry or the circuit judge's response which would induce an otherwise doubtful juror to return a verdict of guilty."

In the case sub judice, Green contends that the use of the word "sufficient" improperly induced doubtful jurors to find him guilty. Examination of the note reveals that the jurors were referred to the instructions already submitted, one of which read:

> The court instructs the jury that if you believe from all the evidence beyond a reasonable doubt that the defendant Alfred Green, Jr. did in fact on July 31, 1981, wilfully, unlawfully and feloniously have in his possession or control a controlled substance commonly

known as marijuana in an amount of more than one kilogram, then and in that event, you must find the defendant, Alfred Green, Jr., guilty as charged.

The instruction to which Green objects, is devoid of the coercive language found in the cases of Warren v. State, Martin v. State, and Carroll v. State. The instruction was more akin to that given in Girton v. State, which told the jury to apply the instructions already given. Therefore, this assignment of error is without merit.

IV.

DID THE TRIAL COURT ERR IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE IN THE BASIS OF AN ILLEGAL ARREST?

Appellant contends that the arrest warrant issued to agent Turner was not based upon probable cause and that the marijuana seized as a result of his arrest is inadmissible as fruit of the poisonous

tree. Appellant contends that the affidavit submitted to the magistrate did not contain sufficient information to support an independent judgment of probable cause. Green states that the fact that Turner's oral testimony was not incorporated on the affidavit renders it insufficient to support probable cause. Further, Green contends that Turner did not have a reliable source of information which linked Green to the cocaine sale on July 15, 1981.

In Wilborn v. State, 394 So.2d 1355, 1357(1981), this Court held that affidavits not sufficient on their face may be supplemented by sworn oral testimony to establish sufficient facts to show probable cause. In this case, as in Wilborn, the written affidavit contained a conclusory statement that the defendant had violated a controlled substances law. This Court allowed police testimony

to supply all of the facts and circumstances to establish probable cause. See Dissent, 394 So.2d at 1358-59.

Examining the testimony presented to Judge Shanks, he was faced with the following facts: A co-conspirator in a cocaine sale stated that his accomplice obtained the cocaine from Green. Turner's personal observations partially corroborated Green's presence in the building at the time of the cocaine sale. Further, the co-conspirator elicited statements from a friend of the defendant, who acknowledged that the defendant had sold the cocaine. Finally, the person from whom the cocaine was purchased went to Green's apartment empty-handed and returned with the cocaine. Based upon these facts, we find that the trial judge was presented with sufficient evidence from which to conclude that there was probable cause for an arrest warrant

for Green.

Green's contention insofar as it attacks the insufficiency of the written affidavit, is without merit in light of Wilborn v. State, supra. In considering the facts and circumstances presented to Judge Shanks, we find that he had sufficient reasonably trustworthy information to justify the belief that Green had participated in the cocaine sale. Therefore, we affirm the trial judge's actions in overruling Green's motion to supress.

AFFIRMED

PATTERSON, C.J., WALKER, P.J., ROY NOBLE LEE, P.J., HAWKINS, DAN LEE, PRATHER, ROBERTSON AND ANDERSON, JJ., CONCUR.